Supreme Court, U.S.
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No. (1)

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IN THE

Supreme Court of the United States

GOVINDBHAI M. PATEL,
Petitioner

v.

MICHAEL HESTON,
DISTRICT DIRECTOR OF THE UNITED STATES
IMMIGRATION AND NATURALIZATION SERVICE
and
JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Petitioner's seven years of continuous physical presence in the United States during the period following the Order to Show Cause issued to him on April 6, 1990 constituted a "(seven year) period of continuous physical presence" to qualify him for eligibility for suspension of deportation under former section 244 of the Immigration and Nationality Act ("INA"), 8 USC §1254 (1990).

STATEMENT OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the Eighth Circuit Court of Appeals.

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Regardless whether the issuance of the Order to Show Cause terminated the period of continuous physical presence begun when Petitioner entered the United States, Petitioner accrued a new period of continuous physical presence in excess of seven years after the issuance of the Order to Show Cause. This period of physical presence qualifies Mr. Patel for suspension of deportation.

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PETITION FOR WRIT OF CERTIORARI

Govindbhai M. Patel, the petitioner, respectfully prays that a writ of certiorari issue to review the opinoin and order of the United States Court of Appeals for the Eighth Circuit entered in this case on November 22, 2000 and February 15, 2001, respectively.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals (App.B hereto) is unreported. The opinion of the Eighth Circuit Court of Appeals on the merits (App. C hereto), which is sought hereby to be reviewed, is reported at *Patel v. I.N.S.*, 24 F.3d 376 (Table) (8th Cir. 2000). The order of the Eighth Circuit denying the petition for rehearing en banc and for panel rehearing in such case (App. D hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit [Appendix C] was entered on November 22, 2000. A timely petition for rehearing en banc and for panel rehearing was denied on February 15, 2001. (Appendix D). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(c), in that the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Also, the Eighth Circuit decision is in conflict with an analysis, albeit obiter dictum, of the Ninth Circuit. Sup.Ct. Rule 10(a).

STATUTORY PROVISIONS INVOLVED

Former Title 8, U.S.C., §1254(a) provided in pertinent part:

§1254. **Suspension of deportation**

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and–

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

(2) is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immedi-

> ately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; . . . .

Such provision has been repealed and replaced after this case was initiated with the INS, by Title 8, U.S.C., §1229b (d)(1) and (d)(2), which provide in pertinent part:

Section 1229b. Cancellation of removal; adjustment of status

. . .

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien -

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

. . .

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

STATEMENT OF THE CASE

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA" or "Board") of the Immigration and Naturalization Service and the Eighth Circuit Court of Appeals denying Petitioner's Motion to Reopen and Reconsider his case to allow an application for suspension of deportation.

(ii) Proceedings at the Immigration and Naturalization Service

Petitioner was issued an Order to Show Cause ("OSC") by the Immigration and Naturalization Service on April 6, 1990. The OSC charged him with being deportable as an overstay. At his individual hearing on December 10, 1992, Petitioner conceded deportability and requested relief in the form of asylum, withholding of deportation and voluntary departure. The Immigration Judge denied asylum and withholding and granted Mr. Patel voluntary departure for 120 days, with an alternative order of deportation. Petitioner timely filed his appeal with the Board.

(iii) Proceedings at the Board of Immigration Appeals

Petitioner, through previous counsel, appealed to the BIA detailing allegations of error in the Immigration Judge's findings of fact and application of law concerning the denial of asylum. The Service filed its response brief detailing its arguments in support of the findings of the Immigration Judge. On December 14, 1995, Petitioner filed a motion to remand the case to consider an adjustment of status application in light of Mr. Patel being the beneficiary of an immigrant visa petition. The

Service then filed two memoranda in opposition to this motion to remand, on January 10, 1996 and July 8, 1996. Petitioner filed a reply memorandum on this issue on September 18, 1996. On September 25, 1996, the Service filed a Second additional response to Petitioner's motion to remand. Present counsel entered his appearance with the Board on behalf of Mr. Patel on November 13, 1996 and asked for a continuance of 90 days to file a petition seeking suspension of deportation. The Service opposed the continuance in a memorandum filed November 26, 1996. Petitioner on January 27, 1997 filed a Motion to Reopen and Reconsider (Remand) the case to the Immigration Judge for consideration of Petitioner's attached application for suspension of deportation. The Service then filed a response opposing this motion on February 3, 1997. Finally, on December 14, 1999, the Board upheld the Immigration Judge's decision denying asylum and withholding of deportation, denying Petitioner's motion to remand, and granting 30 days voluntary departure. Petitioner timely filed a petition for review with the Eighth Circuit Court of Appeals.

(iv) Statement of Facts

Govindbhai M. Patel is a citizen of India. He entered the United States pursuant to a lawful visitor visa on September 8, 1989 and has since resided in the United States. He has not departed the United States at any time since his arrival. He is married and has two children, one of whom is a citizen of the United States. He is a successful businessman and a valuable member of his local community. On April 6, 1990 the INS issued Mr. Patel an Order to Show Cause ("OSC") charging him with deportability, and Mr. Patel asked for political asylum. After his asylum case was denied by the Immi-

gration Judge in December 1992 and a timely appeal was filed, it took the BIA **nearly seven (7) years** to issue its decision. If Mr. Patel were to have left at any time during the pendency of this appeal, he would have "self-deported", causing him not only to abandon his appeal but also to incur a five (5) year bar to his return. Former 8 U.S.C. §1182(a)(6)(B), former INA §212(a)(6)(B) (1990).

When Mr. Patel had accrued seven (7) years of continuous physical presence in the United States after his original entry, he filed a Motion to Reopen and Reconsider (Remand) with the Board, asking for suspension of deportation. At the time he filed this motion, he was qualified for the relief requested. Instead of considering this motion promptly, the BIA took nearly another three years to decide the case. In the meantime, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") took effect, and was subsequently amended by the Nicaragua and Central American Relief Act ("NACARA") to cause an OSC to terminate a continuous period of physical presence in the U.S. for purposes of suspension of deportation (sometimes called the "stop time rule"). When the Board finally issued its decision on December 14, 1999, it ruled that Mr. Patel did not accrue seven or more years of physical presence due to the OSC issued in 1990. It did not address, however, the fact that Mr. Patel had accumulated over seven years of continuous physical presence after the issuance of the OSC and *before* the Board issued its decision. Mr. Patel filed his Petition for Review in the Court of Appeals for the Eighth Circuit on January 12, 2000. That court issued its decision on November 22, 2000, denying the appeal, ruling that his arguments involving physical presence and the stop-time rule are foreclosed by recent

decisions of that court. Mr. Patel filed a motion for rehearing en banc, which was denied on February 15, 2001.

v. Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction was proper in the Eighth Circuit Court of Appeals pursuant to §106 of the INA, 8 USC §1105(a)(1990) as amended by §309 of IIRIRA, Pub.L. 104- 208, 110 Stat. 3009. In the alternative, the Court of Appeals had jurisdiction under §242 of the INA, 8 USC §1252 (1996). Venue was proper under §106 of the INA, 8 USC §1105 (1990) as amended by §309 of IIRIRA or in the alternative under §242 of the INA in that the judicial proceedings were completed by the immigration judge sitting in St. Louis, Missouri in the Eighth Circuit.

The jurisdiction of this Court on application for a writ of certiorari is invoked under U.S. Supreme Court Rule 10(c) as set forth above. That is, the petition for certiorari will present a substantial question, for the reason that the Eighth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court. That question is whether the accrual of continuous physical presence the United States required for eligibility for suspension of deportation under 8 U.S.C. § 1254(a)(i) may begin *after* the alien is served an order to show cause. The decision by the Eighth Circuit, interpreting a recent amendment by Congress to the statutory scheme concerning deportation, threatens thousands more aliens residing in the United States with deportation. Such interpretation is not required by the language of the statutory amendment. This result

will affect not only the aliens concerned, but also their families (many of which, as in this case, include children who are U.S. citizens.)

Jurisdiction of the Supreme Court also exists because the decision of the Eighth Circuit herein is in conflict with the theory expressed by the Ninth Circuit Court of appeals, in a footnote, that the alien therein satisfies the requirement because "she has accrued [seven or more] years of physical presence **since**. . ." the show cause order. *Arrozal v. INS*, 159 F.3d 429, 434, n.2 (9th Cir. 1998) (emphasis in original). (Case decided on other grounds).

REASONS FOR GRANTING THE WRIT

Regardless whether the issuance of the Order To Show Cause terminated the period of continuous physical presence which began when Petitioner entered the United States, Petitioner accrued a new period of continuous physical presence in excess of seven years after the issuance of the OSC. This period of physical presence qualifies Mr. Patel for suspension of deportation.

The Eighth Circuit Court of Appeals denied Mr. Patel's petition based upon its own holding in *Afolayan v. INS,* 219 F.3d 784 (8th Cir. 2000). *Afolayan*, however, was decided based on faulty reliance on the holdings of the Board in *In re Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000), 2000 WL 225840 (BIA) and *Matter of Nolasco*, Int. Dec. 3385 (BIA 1999). The *Nolasco* decision adverts to the fact that the issuance of an OSC may end a period of continuous physical presence acquired before then, but does not address whether an alien may accrue a *subsequent* period of continuous physical presence. *In re Mendoza-Sandino* stands for the proposition that an

OSC ends all periods of physical presence and that no further period may accrue.

In *Matter of Nolasco*, the Board ruled that section 202 of the NACARA amended section 309(c)(5) of the IIRIRA so that the provisions of section 240A(d) of the INA, 8 USC §1229b(d) applied to Orders to Show Cause issued on, before or after the enactment of the IIRIRA. This issue is not relevant to this case.

In the instant case, the Board, again relying upon *Matter of Nolasco*, determined that the issuance of the OSC to Mr. Patel on April 6, 1990 ended the period of continuous physical presence begun by Mr. Patel in September 1989–short of the seven years required by INA sec. 244. However, the Board did not even discuss the accumulation of seven years's continuous physical presence acquired by Mr. Patel *after* the issuance of the OSC. In fact, seven years continuous physical presence had been acquired by Mr. Patel after the decision of the Immigration Judge on December 10, 1992 and before the Board's decision on December 14, 1999.

At the time of the Board's decision in Mr. Patel's case, Mr. Patel had been present in the United States for nearly 10 years after the issuance of the OSC, had made a prima facie showing of good moral character during the seven year period immediately preceding the Board's decision, and had made a prima facie showing of extreme hardship to himself and U.S. citizen child. In spite of all this, the Board did not discuss this renewed period of physical presence. It simply held that he was not statutorily eligible pursuant to *Matter of Nolasco*. The Board also made no "good moral character" determination of Mr. Patel for the seven year period immedi-

ately preceding its decision.[1] Finally, the Board did not decide that he failed to merit suspension of deportation as a matter of discretion. A correct reading of the Immigration and Nationality Act compels remanding this case to the Board to at least consider whether or not Mr. Patel merits suspension of deportation under INA § 244. To have done otherwise was an abuse of discretion by the Board.

At the time of filing this Petition for Review in the Eighth Circuit, the only opinion the Board of Immigration Appeals had rendered on the subject of whether an alien could accrue a subsequent qualifying period of continuous physical presence for suspension of deportation purposes was an unpublished decision, *In re* _____, File A28 753 481, August 10, 1999 (Vacca)[2] In that decision, Board Member Vacca noted that *Matter of Nolasco* caused the respondent's period of continuous

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[1] Although the Board stated that Mr. Patel gave fraudulent testimony at his hearing dated December 10, 1992, and that this barred a finding of good moral character, this assertion does not result from any finding of fraud by the Immigration Judge from whom this case was appealed to the BIA. Instead, the Board relies upon a letter written to the INS on a different, though related, matter by a former counsel of Mr. Patel. First, this is not to be construed as any such admission by Mr. Patel; the statements made by his counsel in correspondence to the INS, not to the Immigration Court, are hearsay and cannot support a particularized finding of fraud. Second, even assuming that said letter may be so used, the latest date of fraudulent testimony was December 10, 1992. Thus, Mr. Patel can show good moral character for the seven year period immediately preceding the Board's refusal to remand his case for decision of his suspension of deportation application on the merits, as required by INA sec. 244.

[2] Due to the fact that this decision is unpublished, pagination herein is given as reproduced in the appendix to this petition.

physical presence to end at the issuance of the OSC. However, the respondent in that case has accrued an *additional* period of physical presence after the OSC was issued. Member Vacca then stated:

> ...while the occurrence of an event specified in section 240(d)(1) of the Act (INA) ends "any period" of continuous physical presence preceding the event, the statute does not explicitly preclude the initiation of another period continuous physical presence for purposes of relief...Accordingly, we will remand the record to the Immigration Judge for consideration of the respondent's application for suspension of deportation.

In re _____, pp. A-2 (appendix pagination) (citations omitted).

However, after the filing of the instant Petition for Review, the Board reversed course and issued a published decision deciding exactly the opposite of Member Vacca's August 1999 decision. In *In re Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000), 2000 WL 225840 (BIA), the Board held that service of an Order to Show Cause and Notice of Hearing (OSC) not only terminates the period of physical presence accrued to that point, but also precludes the accrual of a subsequent period of physical presence for suspension of deportation eligibility. As Board Member Guendelsberger stated in dissent, "Such a broad reading of section 240A(d)(1) [of the INA] is not supported by either the wording or the legislative history of that provision." *In re Mendoza-Sandino, id* at _____. (Guendelsberger, dissenting).

The dissent correctly points out that the starting point for a correct understanding of section 240A(d)(1)

is the statutory language itself. Section 240A(d)(1) of the INA, 8 U.S.C. §1229b (d)(1), states as follows:

> TERMINATION OF CONTINUOUS PERIOD.–For purposes of this section, **any period** of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders an alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(Emphasis added).

The statement that "any period" of continuous physical presence ends upon service of the notice to appear[3] strongly suggests the conclusion that there may be more than one period of continuous physical presence that may be accrued. Section 240A(d) clearly terminates the period accruing prior to the OSC, but is silent concerning physical presence acquired after the OSC. The reference to ending "any period" of physical presence at least suggests that another period of physical presence then ensues. *Id.* at _____ .

The Ninth Circuit acknowledged this interpretation of section 240A(d)(1) in the case of *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998). In that case the court held that an alien should have been granted a motion to reopen in order to grant suspension of deportation. Although the case was decided on other grounds, the Ninth Circuit

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[3] Again, through the NACARA, "notice to appear" comprehends OSCs issued on, before or after the effective date of the IIRIRA.

did note that an alien can satisfy the requisite period of continuous physical presence, even under the new test, "by virtue of the fact that she has accrued (seven or more) years of physical presence *since* the INS issued her an order to show cause." *Id* At 434, n.2 (Emphasis in original).

Even the common dictionary meaning of "any" supports Petitioner's reading of the statute. "Any" does not mean "all" or "every". "Any instead means "one or some, regardless, of sort, quantity or number, one or another selected at random". *Webster's II New Riverside University Dictionary* 93 (1984). See *In re Mendoza-Sandino*, *supra* at _____ (Villageliu, dissenting). "Any period" of physical presence ended by an OSC does not mean "all" or "every" period is ended. There can be further periods.

Furthermore, under section 244, there are two different periods of time needed to show eligibility for suspension of deportation. INA §244(a)(1), under which Mr. Patel qualifies, requires seven years; however, INA §244(a)(2), which covers certain criminal aliens, requires ten years. INA §244, 8 §1254 (1990). Under former law, after the conviction of a crime covered in section 244(a)(2), ten additional years of continuous physical presence was required to qualify. *Matter of Lozada*, 19 I&N Dec. 637(BIA). Time accrued before conviction could not count. If periods of continuous physical presence following conviction are not allowed, then *no §244(a)(2) application could ever be approved*– the commission of the very crime which places the applicant under the necessity of accruing ten more years of presence would bar the applicant from ever starting to accrue it, under the view held by the BIA in *In re Mendoza-Sandino*, Int. Dec. 3426 (BIA 2000). This is clearly an absurd result.

Moreover, the INA has historically recognized that there can be different and succeeding periods of physical presence for purposes of suspension of deportation. "Thus the resetting of the physical presence clock upon the occurrence of particular events has been and remains inherent in the eligibility provisions for suspension of deportation." *Id.* at ___ (Guendelsberger, dissenting).

Had Congress intended the issuance of an OSC to bar all future eligibility for relief and to preclude the possibility of accruing physical presence, it would have clearly stated that issuance of an OSC prior to accruing seven years of presence makes one ineligible for suspension. Instead, the special rules relating to continuous physical presence are set forth in a separate provision. This should lead this Court to recognize that while an OSC can break continuity of physical presence, it does not preclude an alien from ever again accruing the necessary period of time. *Id.* at ___ (Guendelsberger, dissenting).

Because the statutory language of section 240A((d)(1) of the INA is unambiguous, it compels reversal of the BIA's holding in *In re Mendoza-Sandino*. But, even were such language ambiguous, the Supreme Court must resolve ambiguity in the immigration statutes in favor of the alien. *INS v. Errico,* 385 U.S. 214, 225 (1966); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Deportation is such a severe penalty that the Court must read relevant statutes as narrowly as possible.

Finally, as dissenting Member Villageliu states in *Mendoza-Sandino, supra* at , the BIA's decision mistakenly assumes that no deportation proceeding may ever

be won by the alien.[4] That is, if an alien in proceedings prevails on the issue of deportability and proceedings are terminated, that alien can never again accrue any period of physical presence or residence under the holding of the BIA. *Id.* at 11 (Villageliu, dissenting). This would be true even if the Immigration Judge finds that proceedings should never have been instituted in the first place. This makes no sense.

CONCLUSION

This Court should thus conclude that the BIA's decision in *Mendoza-Sandino* is erroneous and cannot be followed. First, the most logical reading of the statute supports Mr. Patel's position–that he may accrue continuous physical presence after the issuance of an OSC. At the very least, if the statutory language can be said to be ambiguous, any ambiguity must be resolved in favor of the alien. This Court reviews the BIA's findings and the Eighth Circuit's findings of law *de novo*. Petitioner prays that this Court reverse the decisions of the Eighth Circuit Court of Appeals and the BIA, hold that a period of continuous physical presence may be accrued after issuance of an order to show cause, that Petitioner accrued such seven years of continuous physical presence, and remand this matter to the BIA for further proceedings consistent therewith and for such other and further relief as this Court deems just and proper.

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[4] Another dissenting Member, Chairman Schmidt, noted that it is not always the fault of the aliens that deportation proceeding can suffer incredible delays. They have no control over administration decision-making, and cannot be faulted for exercising their rights of appeal. *Id* at 13 (Schmidt, dissenting).

Respectfully submitted,

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